COURT OF APPEALS DECISION DATED AND FILED

October 26, 2010

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. ***See*** **WIS. STAT. § 808.10 and RULE 809.62.**

Appeal Nos. 2010AP432
2010AP558

Cir. Ct. Nos. 2005CF781
2005CF991

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT III

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

STEPHEN C. SHERMAN,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Brown County: DEE R. DYER, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Stephen Sherman, pro se, appeals an order denying his WIS. STAT. § 974.06[1] motion for postconviction relief. Sherman argues the circuit court erred by denying his motion without an evidentiary hearing. He contends he received ineffective assistance of postconviction counsel and also argues new factors warrant sentence modification. We reject Sherman's arguments and affirm.

BACKGROUND

¶2 Sherman was charged with multiple counts of sexual assault of a child in both Outagamie and Brown Counties. Sherman pled no contest, and the Brown and Outagamie County cases were consolidated for sentencing.

¶3 In Outagamie County case No. 2005CF781, Sherman was convicted of repeated second-degree sexual assault of the same child, contrary to WIS. STAT. § 948.025(1)(b), with a sentence of fifteen years' initial confinement and fifteen years' extended supervision, and sexual assault of a student by school staff, contrary to WIS. STAT. § 948.095(2), with a sentence of five years' initial confinement and five years' extended supervision. In Brown County case No. 2005CF991, Sherman was convicted of sexual assault of a student by school staff, contrary to § 948.095(2), with a sentence of five years' initial confinement and five years' extended supervision, and two counts of second-degree sexual assault of a child, contrary to WIS. STAT. § 948.02(2), with sentences for each equaling ten years' initial confinement and ten years' extended supervision. The court ordered that all the sentences be served concurrently.

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

¶4 Sherman moved for postconviction relief, seeking resentencing. He argued the circuit court failed to consider applicable sentencing guidelines, made unsupported findings about his mental health, and failed to consider sentences in other sexual assault cases involving teachers. The circuit court denied Sherman's motion, and we affirmed. *See* ***State v. Sherman***, 2008 WI App 57, 310 Wis. 2d 248, 750 N.W.2d 500.

¶5 Sherman, pro se, subsequently filed a "Postconviction Motion to Vacate Judgments of Conviction and Modify Sentence or Alternatively Resentence Defendant," pursuant to WIS. STAT. § 974.06. Sherman argued the attorney who represented him on his first postconviction motion and appeal was ineffective by: (1) failing to argue the circuit court should have considered the sentencing guideline for an analogous crime; and (2) failing to argue ineffective assistance of trial counsel. Sherman also argued new factors warranted sentence modification. The circuit court denied Sherman's motion without an evidentiary hearing, and Sherman now appeals.

DISCUSSION

¶6 Whether a postconviction motion alleges sufficient facts to entitle the defendant to a hearing for the relief requested is subject to a mixed standard of review. ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. First, we determine whether the motion alleges sufficient facts that, if true, would entitle the defendant to relief. ***Id.*** This is a question of law that we review independently. ***State v. Bentley***, 201 Wis. 2d 303, 310, 548 N.W.2d 50 (1996). If the motion raises such facts, the circuit court must hold an evidentiary hearing. ***Id.*** "However, if the motion does not raise facts sufficient to entitle the defendant to relief, … presents only conclusory allegations, or if the record conclusively

demonstrates … the defendant is not entitled to relief, the circuit court has the discretion to grant or deny a hearing." ***Allen***, 274 Wis. 2d 568, ¶9. We review the court's discretionary decision under the deferential erroneous exercise of discretion standard. ***Id.***

I. Ineffective assistance of postconviction counsel

¶7 To maintain an ineffective assistance of counsel claim, a defendant must show that counsel's performance was deficient, and that this deficient performance prejudiced the defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To establish deficient performance, the defendant must show that counsel's representation fell below objective standards of reasonableness. ***Id.*** at 687-88. To establish prejudice, the defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Id.*** at 694. We may dispose of an ineffective assistance of counsel claim based on either deficient performance or prejudice, and if we conclude the defendant has failed to prove one prong, we need not address the other. *See* ***id.*** at 697.

¶8 Sherman first contends his postconviction counsel was ineffective by failing to argue that the circuit court erred when it sentenced him on the repeated second-degree sexual assault of the same child charge without considering the sentencing guideline for an analogous crime. At the time Sherman was sentenced, WIS. STAT. § 973.017(2)(a) (2005-06), required that a court imposing a sentence for a felony consider "the sentencing guidelines adopted by the sentencing commission under s. 973.30 or, if the sentencing commission has not adopted a guideline for the offense, any applicable temporary sentencing guideline adopted by the criminal penalties study committee created under 1997 Wisconsin Act

283."[2] Sherman concedes no sentencing guideline was ever promulgated for the offense of repeated second-degree sexual assault of the same child. However, Sherman argues that before sentencing him on that charge, the circuit court was required to consider the sentencing guideline for the analogous offense of second-degree sexual assault of a child.

¶9 We do not find Sherman's argument convincing. Under WIS. STAT. § 973.017(2)(a) (2005-06), a sentencing court was only required to consider guidelines that were specifically applicable to the crime for which the sentence was imposed. The statute did not suggest, much less require, that a court consider guidelines for analogous crimes. Thus, the sentencing court in this case did not err by failing to do so.

¶10 Sherman contends the "most analogous guideline" approach is used by federal district courts when no federal sentencing guideline exists for a particular offense. *See, e.g.*, ***United States v. Jones***, 278 F.3d 711, 716 (7th Cir. 2002). However, Wisconsin courts are not bound by federal sentencing guidelines, ***State v. Kaczynski***, 2002 WI App 276, ¶11 n.1, 258 Wis. 2d 653, 654 N.W.2d 300, or by federal cases dealing with federal rules that are different from Wisconsin rules, *see, e.g.*, ***State v. Copening***, 103 Wis. 2d 564, 576, 309 N.W.2d 850 (Ct. App. 1981). Consequently, the sentencing court was not required to use the federal "most analogous guideline" approach when sentencing Sherman.

¶11 Sherman also relies on ***State v. Jorgensen***, 2003 WI 105, ¶27, 264 Wis. 2d 157, 667 N.W.2d 318, which held it was not error for a court to consider

[2] WISCONSIN STAT. § 973.017(2)(a) (2005-06), has since been repealed. *See* 2009 Wis. Act 28, § 3386m.

an analogous sentencing guideline when there was no guideline specific to the offense for which the defendant was being sentenced. However, ***Jorgensen*** does not stand for the proposition that a sentencing court is required to consider analogous guidelines. To the contrary, the supreme court cautioned that because the legislature specifically delineated the offenses to which guidelines applied, a sentencing court should not apply the guideline for one offense as the sole basis for a sentence on a different offense. ***Id.***

¶12 We conclude Sherman's analogous sentencing guideline argument is without merit. Failing to make a meritless argument does not render counsel's performance deficient. ***State v. Toliver***, 187 Wis. 2d 346, 360, 523 N.W.2d 113 (Ct. App. 1994). Consequently, postconviction counsel's failure to raise the analogous sentencing guideline argument did not constitute ineffective assistance. Because Sherman's postconviction motion did not allege sufficient facts that, if true, would entitle Sherman to relief on this basis, the circuit court did not err by denying his motion without a hearing.

¶13 Sherman next argues his postconviction counsel was ineffective by failing to argue ineffective assistance of trial counsel. Sherman contends his trial counsel should have presented evidence at sentencing regarding MySpace.com postings by Caitlin R., one of Sherman's victims. In a letter read at sentencing, Caitlin stated she was in an emotional prison because of what Sherman had done to her. She wrote that she lost friendships with others her age, was barely able to leave home, could not go to school, and hid under layers of clothing and makeup. Caitlin's mother similarly testified Caitlin was a captive in her house, feared the outside world, and did not go to social events. It is undisputed that the court considered these statements in sentencing Sherman. Sherman alleges the MySpace postings would have rebutted this testimony, because they contained

"provocative pictures" of Caitlin, discussion of "personal and sexually explicit matter[s]," and comments about going to school, dating, and socializing with friends.

¶14 Sherman's postconviction motion contained only conclusory allegations about the MySpace postings. In an affidavit attached to the motion, Sherman's mother, Claudia Starr, alleged her daughter printed the MySpace postings from the internet. However, the postings themselves were not attached to the affidavit. As a result, there is no way to know if Starr's statements about the postings are accurate. Furthermore, although Starr alleged the MySpace posts were printed from the internet between October 2005 and June 2006, there is no indication of when Caitlin actually posted the material. Thus, it is possible the posts were made long before sentencing and reflect circumstances that had since changed. Without knowing when the posts were made, it is impossible to know whether they actually contradict anything in Caitlin's letter or in her mother's testimony at sentencing.

¶15 A postconviction motion requires more than conclusory allegations to succeed. *See* ***Allen***, 274 Wis. 2d 568, ¶15. Because Sherman's postconviction motion contained only conclusory allegations about Caitlin's MySpace postings, Sherman has not shown how he might have been prejudiced by his trial counsel's failure to bring the posts to the sentencing court's attention. Sherman's motion therefore failed to allege sufficient facts to warrant relief on his ineffective assistance claim. Accordingly, the circuit court did not erroneously exercise its discretion by denying Sherman's motion without a hearing.

II. New factors warranting sentence modification

¶16 Sherman also argues new factors exist warranting modification of his sentence. "The purpose of … sentence modification is to correct an unjust sentence." ***State v. Koeppen***, 2000 WI App 121, ¶33, 237 Wis. 2d 418, 614 N.W.2d 530. "Before a sentence will be modified, the defendant must demonstrate, by clear and convincing evidence, that there is a new factor justifying the court's reconsideration." ***Id.*** (citation omitted). A new factor is a fact or set of facts highly relevant to the sentence determination, that was not known to the trial court at the time of original sentencing because it was not then in existence or was "unknowingly overlooked" by all parties. ***Rosado v. State***, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975). Additionally, a new factor must frustrate the purpose of the original sentence. ***State v. Michels***, 150 Wis. 2d 94, 99, 441 N.W.2d 278 (Ct. App. 1989). Whether a new factor exists is a question of law that we review independently. ***State v. Lechner***, 217 Wis. 2d 392, 424, 576 N.W.2d 912 (1998).

¶17 Sherman first argues a new factor exists because he was diagnosed with a dependent personality disorder by psychiatrist Stephen Hull after he was sentenced. However, at sentencing, Sherman submitted a report by psychologist Gerald Wellens, who had also diagnosed Sherman with a dependent personality disorder. The sentencing court discounted Wellens' opinion, preferring instead to rely on the testimony of the victims and their families that Sherman was a controlling, manipulative, and obsessive person. Because the court was aware of Sherman's original diagnosis at the time of sentencing, Sherman's subsequent diagnosis with the same condition is not a new factor. Additionally, Sherman's postconviction diagnosis does not frustrate the purpose of his sentence, given that the court explicitly discounted the original diagnosis when sentencing him.

¶18 Sherman also argues the statement of Patricia R., the aunt of one of his victims, is a new factor. Patricia signed a statement asserting that her niece, Tamara R., "aided [Caitlin] in writing her character letter about Steve Sherman." According to Sherman, Patricia's statement shows that Tamara had "undue influence" over Caitlin, thereby lessening the credibility of Caitlin's sentencing letter. However, Patricia does not suggest that anything Caitlin wrote was false. Nothing in Patricia's statement supports Sherman's contention that Tamara exerted "undue influence" over Caitlin. The mere fact that Tamara helped Caitlin write her sentencing letter is not highly relevant to the original sentence determination. Thus, even if true, Patricia's statement would not constitute a new factor.

¶19 Sherman's postconviction motion did not allege sufficient facts that, if true, would entitle him to sentence modification. Neither Sherman's postconviction diagnosis nor Patricia R.'s statement is a new factor. As a result, the circuit court did not erroneously exercise its discretion by denying Sherman's postconviction motion without a hearing.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.